IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND ELECTRIC RAILWAY, a corporation, *Plaintiff in Error,* vs. ALEXANDER MATSON, *Defendant in Error.*	No. 3092

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

F. D. OAKLEY,
Attorney for Plaintiff in Error.
408 Perkins Bldg., Tacoma, Wash.

Allen & Lamborn Printing Co., Tacoma, Wash.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

PUGET SOUND ELECTRIC RAILWAY, a corporation, *Plaintiff in Error,* vs. ALEXANDER MATSON, *Defendant in Error.*	No. 3092

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

This case was brought by the defendant in error to recover damages for injuries sustained, as he alleges, while attempting to board an Interurban train operated by plaintiff in error at Pacific City, Washington.

"That on the 20th day of March, 1915, plaintiff went to the station of the defendant, at Pacific City, for the purpose of boarding the train of defendant for transportation to Tacoma; that the said train, arriving at the said station, stopped and discharged one passenger, and that thereupon, while the said train was at a standstill, plaintiff attempted to board the same, but that while he was in the act of boarding the said train it was suddenly started by a jerk which threw plaintiff under the wheels of the rear car of said train, which ran over his left foot and mangled and cut a part thereof so that it became necessary that a part of the foot should be amputated and removed.

"That the said injury to plaintiff was caused by the negligent starting of the said train by defendant, its agents and servants, without warning to him, while plaintiff was in the act of boarding the same and while he was holding one of the rods provided for the purpose of aiding and assisting in the boarding of said train, and to the further negligence of the defendant in not permitting the train to remain stationary a sufficient length of time for plaintiff to

board it, and in not providing some means whereby the said train would remain stationary long enough for the plaintiff to board it, and in not providing for some means by which the said train would be kept stationary while it was being boarded by plaintiff; and to the further negligence of the defendant in not providing some means by which the motorman or the operator of the said train was informed and knew that the plaintiff was in the act of boarding it."

The defendant in its answer denied the negligence complained of and for an affirmative defense alleged:

"That if the plaintiff sustained any injuries at the time and place alleged in his amended complaint herein, concerning which this defendant has no information, and therefore denies the same, the same were caused and occasioned by reason of the careless and negligent conduct of the plaintiff himself, and not otherwise, in that he heedlessly and recklessly undertook to board the said train in an improper manner while the same was in motion, and at the time said train was put in motion neither plaintiff nor any other passenger was on the platform of said station or attempting to board the said train when the same was put in motion, and that if plaintiff attempted to board said train he did so after the same was put in motion, and after the doors and vestibule of said train had been closed, and that plaintiff failed to exercise his mental faculties in any way to observe, avoid, and escape the risks and dangers of attempting to board a moving train, and that he failed to

take proper care to provide for his personal safety."

Plaintiff's version of how the accident occurred is incorporated in Transcript of Record on pages 20 to 25, inclusive, and is as follows:

"My name is Alexander Matson. I was born in Finland in 1889 and came to the United States about eleven years ago. I worked for the New York Central on a pile-driver and at many other places. About seven years ago I came to the Pacific Coast. I worked in California, Idaho, Oregon and Washington in logging camps, saw mills, smelters and at other common labor. On March 20th, 1915, I was in Seattle and went from there to Pacific City, arriving at the interurban station at about nine o'clock P. M. I waited for the interurban train going to Tacoma which came along about eleven o'clock. When the train came in to Pacific City it stopped right at the depot and let one man off the car so I was standing at the lower end of the depot, the end towards Seattle. I did not signal the cars because I did not know they had any signal-post there at the depot at that time, because I had never been at a way station between Tacoma and Seattle before, so I was standing at the lower end of the depot when the train came in and stopped, and one man got off the train, and I started to go up to board the car, and I grabbed the handhold with my right hand, and I was going to step on the car, like a man always used to do, when he gets on a car, so the train started up with a jerk, and she pulled me then, overbalanced me,

and throwed me around, and the wheel went sideways across over my foot. I did not see the conductor at any time."

CROSS-EXAMINATION.

"I was standing close to the turnstile about two or three yards from the turnstile, when the train stopped. Before the accident 'I went a couple of times through that turnstile.' I passed the man who got off the car when he was a little way from the turnstile. I had just taken a few steps and he passed me on the platform. I did not run to catch the car, just took an ordinary walk. The car was stopped when I took hold of it, and I didn't notice the conductor or collector or motorman at all. The vestibule was open. The car stopped about in front of the depot. Mr. Straub came to the hospital to see me a day or two after the accident. Mr. Woods brought up a contract for this case and the first complaint was filed the following Saturday, March 27th."

Defendant's Exhibit "H" is the original complaint filed in the above court March 17th, 1915.

Exhibits "A" and "B" are photographs of the depot at time of accident.

"I was never at the station before and didn't attempt to flag the train, I supposed all trains stopped there. I was six feet from the turnstile and didn't think the train would stop there and I started up."

A. I stayed right there and waited for the car to stop, to slow down.

Q. And when the man got off, you started ahead?

A. I started to go up to take that car.

Q. Now, just take a look at Defendant's Exhibit "B." Now, tell me the point on that photograph where you passed this man when you started up to catch the car.

A. Where, towards that man?

Q. Yes.

A. Just a little way up.

Q. Would it be about the point "X" in that circle?

A. It might have been about that, a few steps. I could not exactly say the distance.

Q. Now, last fall didn't you say this in answer to this question:

> "Q. Now, just look at this exhibit. I want you to mark with a pencil when you passed the man on the platform. A. I think I passed him just here (indicating). Q. Will you mark that 'X' with a circle around it? Now, where you put that 'X' with a circle around it on Defendant's Exhibits 'A' and 'B' is where you passed this man that got off the train, this man that you passed? A. Yes."

Would you say that would be right now, the same as you testified before?

A. As you recall it, that is where you passed this man? A. Yes, sir.

Q. Now, here is another question: "Q. How many feet ahead had you walked when you passed him?" "A. I had not walked, I was just standing up against the end of the platform." Do you remember testifying that way? I want you to understand it: "How many feet ahead had you walked when you passed him? A. I had not walked, I was just standing up against the end of the platform." Do you remember of answering that that way?

A. Yes, I remember it when I was standing down there, and then I started to walk up to get the car.

Q. You testified this morning that you walked and he walked?

A. Yes, sir.

Q. You testified the other time, "I had not walked. I was just standing up against the end of the platform." Wasn't that your testimony before?

A. I do not remember.

Q. "Q. You had not started ahead? A. No, sir. Q. He passed you right where you stood? A. No, sir, I was just starting to go up there. Q. How far did you walk? A. A couple of steps only. Well, I started to go up and he walked past by me. Q. That would be how many yards from the turnstile where you passed? A. It must have been something like three yards from the turnstile." Do you remember that? A. Yes, sir.

Q. That is about right, is it not?

A. Yes, I think that is about right.

"I saw a man when he came from the car, he could not have come from any place else. I was down on the platform and it was dark there and I can't say exactly what step it was he got off of. I cannot say how he stepped off, but he got off the car. I passed him back near the turnstile. When I got hold of the car with my right hand it started up with a jerk and pulled me ahead and overbalanced me. I picked myself up from off the platform and crawled right up on the end of the platform. I had been lying right on the ground there. My head was lying towards Tacoma. When I boarded the car the door of the car was right opposite the door of the depot. The wheels on the last truck ran over me. The company paid all doctor, hospital and medical bills.

"On the day of the accident I left Seattle and went to Kent, and walked from Kent to Auburn. I was in Auburn the best part of the day, leaving there between four and five o'clock in the afternoon, and then walked on the Milwaukee tracks to Pacific City, a distance of three or four miles, and got at Pacific City about nine o'clock. When I got there I made up my mind to go to Tacoma, and had money to pay my fare to Tacoma."

The passenger who alighted from the train at Pacific City referred to by plaintiff, Matson, was Roy Baumgardner, whose testimony on page 34 of the Record is as follows:

"I live in Namba, Idaho, with my father and mother working on their ranch. Have been there about three years. At the time of the accident I was living at Pacific City. On the night of the accident in controversy I got on the train at Auburn about 11:00, after having some dental work done. I was in the front part of the rear car and recognize the conductor here in Court as the conductor in charge of the car I was in. As we were coming in to Pacific City the conductor opened the trap door in the vestibule and the door was then pulled in and I stepped off. I was standing right behind the conductor as close as I could get without being in the road. *When I stepped off the car there was nobody on the platform at any place or near the depot, and no one indicated any intention of boarding the car. I then went out of the turnstile going north and there was nobody on the platform while I was walking along it. When I got out of the turnstile I noticed a man across the track running towards the turnstile. He passed me about four feet from me. He was running towards the depot. The Interurban train was moving when I got to the turnstile. I looked back once and noticed a man who was inside the turnstile, and just as I looked back it looked to me like he was attempting to board the car.* I was not sure because I did not pay so much attention. The lights were burning good and the road was lit up and I would have no difficulty in seeing a person on the platform but there was no one there. I first heard that the man was injured the next evening."

Mr. M. M. Shull saw Roy Baumgardner after he had passed thru the turnstile on his way from the depot and at the same time saw a man running in the road towards the depot. His testimony on page 36 of the Record is as follows:

"I live on a fruit ranch in Yakima County. At the time of the accident I lived in Pacific City. About 11:00 that night I was standing in front of my son's store which I was tending for him. This store is about sixty-five feet from the depot. I closed the store about 11:00 or a few minutes after, and saw the Interurban come in from Seattle to Tacoma. There were two lights on the outside of the store next to the street. They burn all night and throw a very good light directly across the road. *I had just come out of the door when the train was standing there. Baumgardner he was about the North side of the street just crossing the road. I saw another man just a moment before. He was running in the road towards the depot right about the middle of the street and the train was standing there then.* I did not see the train start up and didn't pay any further attention to this man. I saw this man about ten or fifteen seconds before I saw Roy. I did not see him go through the turnstile or as far as the turnstile."

CROSS-EXAMINATION.

"I did not see Matson run around the back of the car. I saw Baumgardner just after I saw this man running. I was standing right in front of the store on the porch. There is some lights on the poles

shown at the point "J" on Defendant's Exhibit "E," those lights were put in later. There were lights on the depot. This man when I saw him was about the middle of the street shown on the map, going towards the platform. Baumgardner was on the North side of the street. I think he went straight across the street from the turnstile. *I did not see Baumgardner and this man pass, I saw the man running first; then in probably fifteen seconds I saw Baumgardner.* I saw Baumgardner at the point I marked with the letter "P" on the map, and "P-prime" at the place where the man was running. I could see the man because there are two strong electric lights on the building and lights on the depot."

REDIRECT EXAMINATION.

Q. When you fixed this point "P," P-prime, on the map, what did you mean by that? Did you mean them to be the exact location or just approximately? A. I did not mean it to be exact.

Q. It may be two or three feet off or more than that? A. It might be."

E. M. Newcomb testified that he was the first person to find the plaintiff, who was then inside of the depot, after the accident, and that at the time he saw him plaintiff's breath smelled of whiskey and the plaintiff, in his judgment, was intoxicated. Record, page 33.

There were two cars on the train with a con-

ductor in charge of each car. One of the conductors, William Maurer, in charge of the rear car which Matson said he was attempting to board, saw no one on the platform and no one was attempting to board the car when he closed the vestibule door and platform. His testimony is as follows: Record, pages 30-31.

"I live in Seattle. Have been working as conductor for the defendant company about twelve years and was in charge of the rear car of the train in controversy. A passenger got on at Auburn. Trains stop at Pacific City only on signal. We stop only when we have passengers to let off or pick up. When we approached Pacific City the passenger got up and came to the front door and opened it just as the train came in and stopped. *I opened the trap which covers the steps on the inside flush with the platform and then I stepped to one side to let him off. The door cannot be opened without the trap down. The passenger was standing on the platform ready to get off and nobody was on the station platform to board the train.* The lights of our car and the lights on the station light up the platform so you could see anyone there. *I did not see anyone walking from the rear of the car as if they were going to approach it and there was nobody signalling or attempting to board the car when the signal was given to go ahead. As soon as the passenger got off I looked to see if there was anyone to get on and there was no one there, and I gave the signal to McClintock with my hand to go ahead and he pulled the*

bell. Just as he pulled the bell I closed the door. The car did not start with any violent or unusual jerk. I did not hear of this accident until 10:00 the next day when the agent called me up.

CROSS-EXAMINATION.

"I was not back in the middle of the car when the car started. I did not get off the car that night. We are always two or three minutes late and we might have been two or three minutes late this time. I can tell exactly where I stood when we were at Pacific City. A signal board is provided at the station for passengers wanting to board the car. If we do not get a signal we think they are only standing there.

REDIRECT EXAMINATION.

"It is the duty of both conductors to watch signals of passengers given for boarding the train."

Mr. H. E. McClintock, the conductor in charge of the head car, saw no one on the platform and no person was attempting to board the train when it started, and testified at follows: Record, page 29.

"I live in Sacramento, California, and am employed as conductor on the Northern Electric Railway. At the time of the accident in controversy I was the conductor on the head car. We left Seattle at 10:05. After leaving Algona conductor Maurer on the rear car gave a signal with the bell cord to the motorman to stop at Pacific City. We stopped; one passenger alighted from the rear car, after which I

looked out and saw there was nobody to board the train and I stepped over on the other side of the vestibule, pulled the bell cord for the motorman to go ahead and we started. I stepped back into the vestibule and looked out again. After leaving Pacific City the vestibule doors were closed on each car. I raised up the trap and opened the outside door. I was in the vestibule when the car stopped at Pacific City and only one passenger got off and nobody got on, and nobody was waiting on the platform to board the train. The car started in the ordinary manner without any jar or jolt at all. Algona is about two miles from Pacific City and Auburn about three miles from Pacific City. Defendant's Exhibit "D." is a photograph of the rear end of motor car Number 516 in my charge at that time. I didn't hear anything of the accident until the following day."

The motorman, Henry Martin, did not see anyone on the platform or about the station when he pulled into the station, and when he stopped. His testimony is as follows: Record, pages 27-28.

"I live at Renton and have been employed for the defendant company as motorman for seven years and was motorman in charge of the train in controversy. We left Seattle at 10:05 and arrived at Pacific City about 11:00 o'clock. The number of the motor was 516. The train consisted of two cars. One in charge of Conductor Maurer and the other in charge of Mr. McClintock. *While pulling into Pacific City I got a signal to stop there and made just a short stop of twenty-five or thirty seconds and then*

got a signal to go ahead and started it up. The headlights were burning and also the lights at the station. *I did not see anyone on the platform or about there at the time.* The cars are each about fifty-five feet long and the front end of the motor was stopped fifteen or twenty feet south of the south end of the platform and south of the fence. I started the car just as usual, one point on the controller right after the other. *It is impossible to start the motor in such a manner as to throw a man a distance of six or eight feet while attempting to board the car. If the car is started suddenly the power is thrown off by the automatic circuit breaker. I did not see any passengers get off the car at the station. I was on the opposite side of the car from the platform.*

CROSS-EXAMINATION.

"I did not hear of the accident until the next day. That night I went back to Seattle on the local train and do not remember whether I stopped at all the stations or not on the return trip. I did not see anyone on the platform. My attention was called to the accident the next afternoon. I know that I did not start until I got a signal, but do not know where the conductor was when the signal was given. We were about five minutes late at Pacific City. When the train pulls into the station the lights are not dim because we are drifting for some distance before we start to stop. When we start the lights are dim."

The attention of the Court is directed to the photographs taken three days after the accident in-

troduced in evidence as Defendant's Exhibits A and B, which show the true condition of the station at the time of the accident. The turnstile in controversy is shown to be at the end of the platform near the highway. Plaintiff testified that on the day of the accident he left Seattle and went to Kent and walked from Kent to Auburn. He left Auburn between four and five o'clock in the afternoon and then walked on the Milwaukee tracks to Pacific City, a distance of three or four miles, and got at Pacific City about 9:00 o'clock, P. M. He said, "When I got there I made up my mind to go to Tacoma." He was at the station something over two hours. He testified that when he saw the train he walked back and remained within two or three feet of the turnstile. That he made no attempt to flag the train either by pulling the semaphore signal, which was installed at the depot and is shown in the exhibits, nor did he wave his hand or use any other means whatever to stop the train. He testified that he stayed within two or three feet of the turnstile until the train stopped, then he started up to board the train, which he stated "did not stop very long, just an instant, to let a passenger alight. I did not see the conductor." He testified that he passed the passenger who got off the car a short distance from the turnstile at the point marked X with a circle around it shown on Defendant's Exhibits A and B. If he did not see the conductor he was not where the passenger alighted from the train and was not ready to board the train at the time the train was started. Two disinterested witnesses, Baumgardner

and Shull, saw him out in the road beyond the turnstile after the train started and Baumgardner, the passenger who stepped off the car, said there was nobody that he could see on the platform as he alighted from the train, but he did see a man running to catch the train. Baumgardner was not on the platform when Matson attempted to board the train, or he would have heard Matson's cries for help. Plaintiff further testified that his foot was not cut off on the depot platform, but that he was dragged beyond the fence, as shown in the photographs, near the semaphore.

At the close of the evidence plaintiff in error requested an instruction in writing directing the jury to bring in a verdict in favor of the defendant, which instruction was denied, and the Court, after giving its instructions, submitted the case to the jury, which returned a verdict for the plaintiff in the sum of $3,500.00. Defendant thereafter made a motion for a new trial, which was overruled, and this Writ of Error is thereupon obtained.

ASSIGNMENTS OF ERROR.

I.

The Court erred in overruling defendant's petition for a new trial on the grounds therein set forth.

II.

Misconduct of plaintiff's attorneys in that the attorney for the plaintiff intimidated one of the plaintiff's witnesses during the course of the trial by

threatening to have him arrested for perjury if he should testify, and in attempting to intimidate witnesses.

III.

Misconduct of attorney for plaintiff in the statements before the jury, that said defendant's witness had perjured himself in the former trial of this action.

IV.

The Court erred in giving the following instruction to the jury:

> "But the passenger and the plaintiff in this case by the same rule is not held to that high degree of care, but he is bound to exercise ordinary care for his own safety when he attempts to board a train, and if he fails to exercise ordinary care for his own safety and because of that failure on his part to exercise ordinary care he is injured, why then he cannot recover, *even if* the defendant company or its servants are negligent."

For the reason that the plaintiff was not a passenger, but according to the evidence of the defendant, was running to get the car after the car had been put in motion, that the plaintiff was not a passenger or an intending passenger, but was a trespasser, and no exercise of ordinary care on his part would justify him in attempting to board the car, and the instruction does not correctly state the duty of the defendant company in the premises, and defendant was entitled to have a jury correctly instructed as to the law relative to its defense.

V.

The Court erred in refusing to give defendant's requested instruction number five as follows:

> "You are further instructed that if you believe from the evidence that at the time of this accident the plaintiff attempted to board said car while the same was in motion, he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said train. The defendant company cannot be held liable for mistakes in judgment made by persons in attempting to board moving cars."

For the reason that said instruction correctly states the law applicable to the facts, and the Court refused and neglected to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

VI.

The Court erred in refusing to give defendant's requested instruction number six as follows:

> "You are instructed that if you believe from the evidence that the train of the defendant was put in motion before plaintiff had attempted to board the same, this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind."

For the reason that said instruction correctly states the law applicable to the facts, and the Court

refused and negleced to give an instruction embodying the same principle of law, and the jury were left without proper guidance, and defendant was thereby deprived of a fair trial.

ARGUMENT.

Assignments II. and III.

The misconduct of Mr. Woods, attorney for plaintiff, during the trial of the case was so flagrant as to require a reversal of the judgment. During an intermission of the Court while the defendant was putting in its evidence, Mr. Woods approached Mr. M. M. Shull, one of defendant's witnesses, in the corridors of the Court just outside the court door, and tried to prevent him from testifying by threatening to send him to the penitentiary. What occurred is shown on page 39 of the Record and is as follows:

Q. Now, did you have a conversation this morning with Mr. Woods in reference to what would happen to you if you testified this morning?

A. Mr. Woods spoke to me in the hall out there this morning.

Q. What did he say with reference to your appearance here as a witness?

A. He said if I lied like I did the other time he would send me to the penitentiary.

Q. When did he tell you that?

A. About an hour ago.

Q. Was Roy Baumgardner there when he told you that?

A. He might have been in the hall, I did not notice.

Q. He told you if you lied like you did the other time he would have you arrested for perjury, didn't he?

A. Yes, and have me sent to the penitentiary.

(Witness excused.)

The COURT.—(Addressing Mr. Woods.) If he lied the other time, why have you not had him arrested before this time?

Mr. WOODS.—Your Honor will remember that in the other trial—(interrupted).

Mr. OAKLEY.—I do not think it is necessary to have any explanation.

The COURT.—If you made that remark in good faith—(interrupted).

Mr. WOODS.—I made that remark in good faith.

The COURT.—Why didn't you have him arrested when this trial came off? Why were you holding it over him when he was a witness in this case?

Mr. WOODS.—The testimony is practically the same now as it was before, that he stood there fifty or seventy-five feet away—he testified that he recognized the witness—I understood the witness to testify in the other trial that he recognized this man —(interrupted).

The COURT.—I did not ask you to rehash this testimony, but if you thought he had perjured him-

self and if you were able to prove it, it would seem to be your duty to start that prosecution and not try to influence his testimony in this trial by talking to him about it.

Mr. WOOD.—Well, all I want is the truth, and I cannot see where he is telling the truth.

Mr. OAKLEY.—It is an attempt to intimidate a witness.

United States, complied Stats., 1916, Sec. 10305; (Crim. Code, Sec. 135), provides that:

"Whoever corruptly or by threats of force or by any threatening letter or communication shall endeavor to influence, intimidate or impede any witness in any court of the United States - - - or endeavor to influence, obstruct or impede the due administration of justice therein shall be fined not more than One Thousand dollars or imprisoned not more than one year or both."

The attempt of Mr. Woods to intimidate Mr. Shull by threatening to send him to the penitentiary in case he testified unfavorable to plaintiff was clearly a violation of this act.

Wilder vs. U. S., 143 Fed., 433.
Davey vs. U. S., 208 Fed., 237.

Mr Woods was also guilty of contempt of Court under Sec. 238, *Judicial Code;* Sec. 1245. *U. S. Compiled Statutes,* 1916, in attempting to obstruct the administration of justice.

In *Ex Parte Lavin,* 131 U. S., 267; 33 *L. Ed.,* 150, the Supreme Court of the United States punished Lavin for contempt of court for approaching a witness in hallway of the court and improperly endeavoring to deter him from testifying.

The following authorities are also in point:

Ex Parte Robinson, 86 U. S., 505; 22 L. Ed., 205.

U. S. vs. Carroll, 147 Fed., 947.

U. S. vs. Huff, 206 Fed., 700.

In re Brule, 71 Fed., 943.

U. S. vs. Toledo Newspaper Co., 220 Fed., 458.

In re Maury, 205 Fed., 626 (Ninth Circuit).

In *State vs. Wingard,* 92 Wash., 219, the Supreme Court of Washington sustained the conviction of Wingard for an attempt to obstruct justice in trying to induce witnesses not to appear at the trial of a case in a court of a Justice of the Peace.

So also in *State vs. Bringgold,* 40 Wash., 12, a conviction was sustained where the defendant attempted to persuade a witness not to testify by resorting to threats to blacken her good name if she did so, although she did appear and testify following the threats.

This Court very recently in the case of *In re Independent Publishing Company,* 240 Fed., 849, had occasion to review many cases upon this point

and we see no necessity of burdening the Court with the citation of further authorities.

It has been held that public policy requires that such conduct irrespective of the question whether it influenced the particular verdict, should be discouraged.

Harvester Co. vs. Hodge, 6 Pa. Dist., 378.

Drake vs. Newton, 23 N. J. L., 111.

McGill vs. Seaboard Air Line R. Co., 55 S. E., 216.

The peculiar interest of Mr. Woods in attempting to intimidate a witness not to testify is explained by the testimony of the plaintiff himself. Record, page 22.

"Mr. Straub" (connected with Mr. Woods in some capacity in his office) "came to the hospital to see me a day or two after the accident, Mr. Woods brought up a contract for this case and the first complaint was filed the following Saturday, March 27th," just one week after the accident.

Mr. Woods not only then was guilty of the violation of a criminal act of the United States and also guilty of contempt of court, but was likewise guilty of gross misconduct in stating in the presence of the jury while the witness was on the stand that the witness was guilty of perjury. Such conduct and threats on the part of an attorney must necessarily greatly excite and irritate a witness and the ends of justice are so obstructed that the rights of a litigant can only be protected by the Court refusing to tolerate

such practice. For this reason alone the judgment should be reversed and a new trial ordered.

ASSIGNMENT IV.

The Court erred in giving the following instruction to the jury:

> "But the passenger *and the plaintiff in this case* by the same rule is not held to that high degree of care, but he is bound to exercise ordinary care for his own safety when he attempts to board a train, and if he fails to exercise ordinary care for his own safety and because of that failure on his part to exercise ordinary care he is injured, why then he cannot recover, even if the defendant company or its servants are negligent." Record, 45-64.

The Court, in its instruction No. II, instructed the jury that "a common carrier of passengers is bound to the highest degree of care consistent with the practical operation of its roads and trains," and then proceeded to instruct the jury as to when a man becomes a passenger. After doing so the Court said, "*but the passenger and the plaintiff in this case* . . . . . ,"—thus instructing the jury that the plaintiff was to be considered a passenger. Defendant's affirmative defense denied that plaintiff was a passenger and alleged affirmatively that if he attempted to board the train he did so after the doors of the train had been closed and the train had been set in motion. In our statement of the case we called the Court's attention to the witnesses who saw the plaintiff beyond the turn-

stile in the road after the train had been started. The train men testified that he was not attempting to board the train when they closed the vestibule doors, and plaintiff's own testimony was to the effect that he was standing near the turnstile a considerable distance from where the train stopped, and did not attempt to start for the train until it had stopped, and according to his own testimony he did not attempt to give any signals to stop the train and did not show any indication of boarding the same until the passenger had walked practically one car length from where he alighted, and that he passed the passenger who alighted from the train a few feet from the point where plaintiff had been waiting. He further testified that the rear trucks of the rear car ran over his foot. Defendant's defense then was based upon the theory that the plaintiff was not a passenger in contemplation of law at the time of the accident, and this issue should have been submitted to the jury and it was error for the Court to instruct the jury as a matter of fact that the plaintiff was a passenger.

Defendant in addition to other objections to the instruction, excepted to the same for the reason that if the plaintiff was not a passenger as it contended he was not, and was running to board the car he was a trespasser and no exercise of ordinary care on his part would justify him in attempting to board the car. The instruction was erroneous and the defendant was deprived from having its defense submitted to the jury, and the jury were erroneously informed

that the exercise of ordinary care on the part of the plaintiff would justify him in attempting to board the train after it had started and its vestibule doors had been closed.

After the defendant had objected to the instruction complained of, the court instructed the jury that if plaintiff "flew at the side of the car, the defendant company did not owe him any exercise of ordinary care. All it did owe him was for defendant and its servants to refrain from wilfully and purposely injuring the plaintiff." This instruction, while in itself couched in language not justified by any facts in evidence states the law as to the degree of care required of the defendant in reference to a trespasser attempting to board a moving car. But the statement that he *flew* at the side of the car did not fairly present the case to the jury. Nor did this instruction in any way meet the objection defendant raised that the instruction here complained of to the effect that the exercise of ordinary care on the part of the plaintiff would justify him in attempting to board the train if moving. This instruction deprived the defendant of a fair trial which requires a reversal of the judgment.

ASSIGNMENTS V-VI.

The Court erred in refusing to give defendant's requested instructions numbered five and six as follows:

> "You are further instructed that if you believe from the evidence that at the time of this

accident the plaintiff attempted to board said car while the same was in motion, he cannot recover damages from the defendant, because he assumed the risk of being injured by attempting to board said train. The defendant company cannot be held liable for mistakes in judgment made by persons in attempting to board moving cars."

"You are instructed that if you believe from the evidence that the train car of the defendant was put in motion before plaintiff had attempted to board the same, this fact would not authorize or make it right for the plaintiff to commit an act of negligence in attempting to get upon said car to prevent being left behind."

These two requested instructions covered the law applicable to defendant's affirmative defense, which as has been stated was based upon the theory that plaintiff was not a passenger but attempted to board the train after the same was in motion. Appellant was entitled to have its theory of the case which constituted an affirmative defense fairly submitted to the jury by proper insructions, and the refusal of the Court to give these instructions was reversible error. In support of this contention we cite the following authorities found from among the many sustaining this rule of law.

"It is the duty of the Court to submit to the jury and give instructions thereon any issue, theory, or defense, which the evidence tends to support. 38 Cyc., 1626."

Callaghan vs. Boston Elev. Ry. Co., 102 N. E., 330.

Baltimore & O. R. Co. vs. Peck, 101 N. E., 674.

Pack vs. Camden Interstate Ry. Co., 157 S. W., 906.

Zelvain vs. Tonopah Belmont Dev. Co., 149 Pac., 188.

Board of Comrs. etc. vs. Pindell, 85 Atl., 1041.

McKennan vs. Omaha & C. B. St. R. Co., 146 N. W., 1014.

Bering Mfg. Co. vs. Femelat, 79 S. W., 869.

St. Louis, etc., Ry. C. vs. Overturf, 163 S, W., 639.

Polk vs. Spokane Interstate Fair, 73 Wash., 610.

Hoffman vs. Watkins, 78 Wash., 118.

ASSIGNMENT No. I.

The facts shown herein in the statement of the case and the discussion of the foregoing assignments of error will, we believe, lead the Court to conclude that the trial court erred in overruling the petition for a new trial presented in this case. We believe defendant's requested instruction to direct a verdict for the defendant should have been granted and that in any event a new trial should have been ordered to rectify the errors made at the trial of this case.

In conclusion we submit that the misconduct of

the defendant in error was of such a vicious and prejudicial nature as to require a reversal of this judgment and also that the defendant was not given a fair trial by reason of the instruction complained of as given by the Court, and by the refusal of the Court to grant defendant's requested instructions five and six.

We therefore request the Court to reverse the judgment entered herein and direct a new trial of th case.

Respectfully submitted,

F. D. OAKLEY,

Attorney for Plaintiff in Error.

408 Perkins Bldg., Tacoma, Wash.